

The sole issue for the Board's review is: did claimant wrongfully refuse a chemical drug test as authorized by respondent's policy?

FINDINGS OF FACT

Respondent is a temporary employment placement agency. As part of its policy, respondent requires its employees to submit to chemical drug testing immediately following any work-related accident. Claimant signed a Drug Screen Authorization and Consent form acknowledging and accepting respondent's post accident drug screen policy on August 5, 2014.¹ Immediately above his signature was written in capital letters:

I UNDERSTAND TOP NOTCH PERSONNEL, INC WILL REQUIRE A DRUG SCREEN TEST WHENEVER AN ON-THE-JOB ACCIDENT OR INJURY IS REPORTED IN ACCORDANCE WITH TOP NOTCH PERSONNEL, INC POLICY AND THIS AUTHORIZATION AND CONSENT. MY REFUSAL TO SUMBIT TO DRUG TESTING WILL BE GROUNDS FOR TERMINATION.²

Claimant completed an interview questionnaire with Angela McBride, respondent's senior recruiter, on August 5, 2014. Claimant indicated on the questionnaire he had no back, knee, lifting, or other injuries or claims.³ Claimant signed the questionnaire form indicating his statements given during the interview were true and correct. Claimant did not disclose receiving medical treatment for his left elbow in June 2014. Claimant also settled a workers compensation claim in 2010, where he received a monetary settlement and impairment rating related to his left elbow. At the time of the interview, claimant also had an ongoing workers compensation claim related to a September 2013 back injury with another employer. Claimant's back injury claim was not settled until December 2014.

On September 29, 2014, claimant was placed by respondent at a foundry. In this position, claimant testified he constantly lifted, pushed and pulled equipment weighing approximately 60 pounds. Claimant agreed he worked 6.23 hours at the foundry on September 29, 2014, though some of this time was spent at training orientation. Claimant testified he spent less than two hours at orientation. Ms. McBride testified the foundry's policy was for an employee to train for approximately two to four hours before being put to work. She confirmed with the foundry that claimant spent most of his time at orientation on September 29, 2014. Mark Esfeld, respondent's president, testified he spoke with a direct supervisor at the foundry and was informed claimant actually physically worked a very short period of time.

Claimant stated his left arm was sore and swollen by the time he left the foundry on September 29, 2014. He testified his left arm was still swollen the following morning, and he informed the foundry supervisor of the problem on September 30, 2014. The foundry

¹ P.H. Trans., Resp. Ex. 1.

² *Id.*

³ See P.H. Trans., Resp. Ex. 4.

supervisor directed claimant to return home and contact respondent. Claimant stated he called respondent on the telephone once he arrived home to report the injury and request medical treatment.

Ms. McBride testified she spoke with claimant on the telephone on September 30, 2014. Ms. McBride admitted she argued with claimant during the conversation, telling him he could not have sustained an injury on the job. Ms. McBride explained she argued with claimant because she felt he could not have hurt himself in such a short amount of time. Ms. McBride stated claimant continued to say he injured himself on the job, and at that point she informed him that he needed to come into respondent's office and take a drug test. Ms. McBride testified claimant refused to submit to a drug test. Claimant disputed Ms. McBride's testimony and denied that he was asked to submit to a drug test. Claimant testified:

Q. [Claimant], were you ever asked to provide a sample or urine or blood for a drug test?

A. No, no.⁴

Ms. McBride recorded, in writing, the subject of the conversation with claimant in compliance with standard operating procedure later that same day. Ms. McBride's note indicated claimant first spoke with Veronica at respondent, who informed claimant his condition was preexisting and any medical treatment would need to be with his treating physician. Ms. McBride then recorded:

. . . I asked him at that time to come in for a drug test and he refused a drug screen so I told him at that time that we will consider that as a refusal for a drug screen and that he was terminated. We would not be responsible for any doctor bills.⁵

Mr. Esfeld testified he was present during the conversation between claimant and Ms. McBride. Mr. Esfeld agreed Ms. McBride told claimant he needed to submit to a drug test. Both Ms. McBride and Mr. Esfeld testified claimant did not appear at respondent's office and did not undergo a drug screening following the conversation of September 30, 2014.

Claimant obtained medical treatment on October 1, 2014, at the Wesley Medical Center emergency room. Claimant was diagnosed with bursitis of the left elbow, provided prescription pain medication, and was taken off work for one day. The emergency room personnel directed claimant to the Center for Health and Wellness for follow up should his condition not improve. Claimant next visited Dr. Holly Terrell at the Center for Health and

⁴ P.H. Trans. at 26.

⁵ *Id.*, Resp. Ex. 5 at 1.

Wellness and began treatment on October 8, 2014. An MRI of claimant's left elbow taken November 3, 2014, revealed osteoarthritic changes of the elbow and a partial-thickness tear of the common extensor tendon.

Although claimant had been terminated from respondent on September 30, 2014, respondent provided claimant with authorized medical treatment with Dr. John Estivo on October 27, 2014. Dr. Estivo cleared claimant for light duty work and provided him with medications and therapy. Claimant treated with Dr. Estivo until December 17, 2014, when it was determined claimant no longer required medical treatment for his left elbow.

At the request of the insurance carrier, respondent provided claimant with a light duty position following the receipt of a report from Dr. Estivo. Mr. Esfeld testified claimant was again terminated when respondent received notification that claimant had falsified information regarding his medical history on the interview questionnaire. Claimant was informed of his termination on November 5, 2014.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501(b)(1)(E) states:

An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

The ALJ made specific findings in her order that claimant was not credible. The undersigned agrees. In her Order, ALJ Marchant wrote:

Claimant did not provide any evidence to refute the testimony and documentation of Ms. McBride other than his own testimony. Claimant's credibility is called into

⁶ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁷ K.S.A. 2013 Supp. 44-555c(j).

question by the false statements he made while interviewing for his position with Respondent. The interview questionnaire specifically asked if he had any back, knee, lifting, or other injuries or claims or restrictions, and Claimant indicated he did not. Claimant signed the form at the bottom declaring that his statements were true. However, less than two months prior to his interview, Claimant was receiving medical treatment for his left elbow. He also had a prior left elbow workers compensation claim for another employer for which he received an impairment rating and monetary settlement in 2010. Additionally, Claimant had an ongoing workers compensation claim related to a back injury at the time he was hired by Respondent for a September 2013 injury, which was not settled until two weeks before the present hearing.⁸

The undersigned agrees claimant misrepresented his physical condition when he completed the pre-employment interview questionnaire.⁹ The Board acknowledges and recognizes the advantage of the ALJ to assess witness credibility.¹⁰ As the Kansas Court of Appeals has noted, appellate courts are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder.¹¹

An employee is required to submit to a chemical test at the request of the employer if the employer's policy clearly authorizes post-injury testing. Claimant signed an authorization for drug screening on August 5, 2014, which clearly authorized post-injury testing. Based upon the credible evidence, claimant refused to submit to a chemical test. As such, his claim is barred by K.S.A. 2013 Supp. 44-501(b)(1)(E).

CONCLUSION

Claimant's claim for compensation is barred by K.S.A. 2013 Supp. 44-501(b)(1)(E).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Ali Marchant dated January 15, 2015, is affirmed.

IT IS SO ORDERED.

⁸ ALJ Order at 2.

⁹ See P.H. Trans., Resp. Ex. 4.

¹⁰ See *Cannon v. Sanders Construction*, No. 198,389, 1995 WL 715327 (Kan. WCAB Nov. 8, 1995).

¹¹ See *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

Dated this _____ day of March, 2015.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Ali Marchant, Administrative Law Judge